

# **Committee on Resources**

## **Subcommittee on National Parks and Public Lands**

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### **Testimony**

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#### **Statement**

**Before the Subcommittee on National Parks and Public Lands**

**United States House of Representatives**

**Regarding the Proposed Rule on Concession Contracts,**

**Title IV, National Park Service Concession Management**

**Improvement Act of 1998**

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**Public Policy Liaison**

**Outward Bound USA**

**February 10, 2000**

Mr. Chairman and members of the committee, Outward Bound would like to thank you for the opportunity to address this hearing on the National Park Service's (NPS) proposed concessions regulations.

I represent Outward Bound USA, a non-profit educational institution and a leader in wilderness and experiential education. For 40 years, the Outward Bound system has teamed with America's wild lands to provide adventure-based education to youth and adults. Outward Bound has the privilege of conducting extended backcountry expeditions - primarily on public lands - to teach leadership, personal development and wilderness values.

The Outward Bound system in this country comprises five wilderness schools and two urban centers. We operate in 25 states and 19 units of the National Park Service. This includes, parks, monuments, recreation areas, seashores and others. Outward Bound has three concession contracts/permits: Dinosaur National Monument (river), Canyonlands National Park (river), and Rocky Mountain National Park (backpacking). In addition, we operate on Incidental Business Permits (IBPs) in 18 units of the Park Service.

From the Gates of the Arctic National Park and Preserve to Everglades National Park, and from Acadia National Park to Joshua Tree National Park, Outward Bound has four decades of experience dealing with an astonishing array of Park Service permits, policies and administrative procedures.

I speak to you today representing a leader in the non-profit wilderness and experiential education communities. I also speak to you and an outfitter and guide. Outward Bound - as is the case with sister

organizations such as the National Outdoor Leadership School (Lander, WY) and Wilderness Inquiry (Minneapolis, MN) - operates as a full "commercial" user of federal lands. As a non-profit, educational organization we compete for and hold federal concessions authorizations in the same manner as for-profit members of the outfitting and guiding industry. All of Outward Bound's operations on federal lands are fully authorized concessions or permits for which we compete for use, comply with administrative procedures and pay appropriate fees.

At this juncture, I should state that the Outward Bound system is in full support of this classification as commercial users of federal lands. In valuing our ongoing partnerships with land managers and America's wild lands, Outward Bound recognizes the need for and merits of proper administration and management of these resources. This includes establishing and defending our use; performing as an accountable user of public resources; protecting the public health and safety; paying an equitable and appropriate share of the cost of administration and management; and working with land managers to educate the American people on natural resources, public lands, responsible recreation and wilderness values.

Effective and efficient concessions management should work to strengthen these relationships and partnerships by recognizing and sustaining the highest quality visitor services and partnerships.

### **Effective Concessions Reform**

If providing the public with high quality commercial recreation and education services while preserving the resource for future generations are the goals; effective concessions management should be based on the following principles:

- Reform must recognize both the role and value of commercial concessioners -- including outfitters and guides -- in providing access to and enjoyment of quality recreation and education experiences in our parks.
- Reform must recognize the concessioner's need for a reliable and stable business climate. Beginning with reliable and consistent permit mechanisms, resource managers have an obligation to work with commercial operators in a manner that is consistent with the development and operation of successful, competitive, long-term business operations.
- Reform must establish incentives for managers and concessioners to effectively meet public demand for commercial services on public lands while satisfying agency mandates for resource protection. For outfitters and guides, the foundation should be performance-based permit renewal based on a system of regular performance evaluations.
- Reform should create incentives for sound resource management and stewardship. Incorporation of resource protection and visitor education elements in performance standards will establish concessioners as full partners in ensuring these resources remain unimpaired for future generations.
- Equitable concessions reform must recognize and accommodate the full spectrum of concessioner services provided in the National Parks. While congressional reform efforts have traditionally focused on the large, hospitality-based concessioners, the bulk of concessions permits are held by what are, in reality, small, family businesses - including a significant majority of the outfitting and guiding industry. For most outfitters, the full range of "market forces" is a daily reality, including strong competition and the need to excel through superior customer service.

- Reform must recognize the undeniable role fees will play in the future of concessions on public lands. The goal should be to ensure that franchise and user fees equitably compensate for the privilege of operating a business on public lands. Return to the government, while a fundamental element in the awarding and renewal of permits, should not supplant customer service and resource protection as the primary factors in these processes. Fees should be applied equitably across all public land users and user groups.
- Fees should stay with the resource or collecting agency. Franchise and user fees should be used to supplement, not supplant, congressional appropriations.

## **NPS Concessions Improvement Act of 1998**

Wilderness educators and members of the outfitter & guide community worked diligently with the Congress on the structure and content of the Concessions Improvement Act of 1998 (the Act). The result was a comprehensive piece of legislation that brought fundamental reform to concessions management in the NPS.

While the Act achieved and delineated significant changes in how all concessions agreements are to be structured and administered, Congress drew careful distinctions between larger, typically hospitality-based concessioners and small business operations - including outfitters and guides.

Having worked with Congress in every step of the process, including the final product that was S. 1693, the intent of the lawmakers could not have been more clear: Outfitters and guides - and wilderness educators by definition - are both full players in the concessions process and partners in meeting public demand for quality visitor services. The outfitting industry, small business-oriented and highly competitive in nature, was recognized as distinct from the larger, service-oriented concessioners through establishment of:

- 1) A \$500,000 annual receipts size standard.
- 2) A Right of Preference for smaller concessioners and outfitters.
- 3) Streamlined administrative procedures for smaller concessioners.
- 4) Performance-based renewal, based on the subordination of fees in the rewarding of contracts.

On performance-based renewal, the intent of Congress is made clear by the following report language:

"With respect to outfitter and guide concessioners, it is important to encourage the continuity of concession operations because of the need to encourage the retention of the highly skilled guides needed to provide a safe and enjoyable experience to backcountry visitors in need of expert assistance."

## **The NPS Proposed Rule on Concession Contracts**

In October 1999, Outward Bound USA joined with the National Outdoor Leadership School (NOLS) to comment on the NPS' Proposed Rule On Concession Contracts (the Rule). [These comments, submitted as The Wilderness Education Coalition (WEC), can be found in Attachment A to this document. Outward Bound requests that they be included in the formal record of this hearing.]

The WEC comments detail areas where wilderness educators are in support of the Rule, and also note the deficiencies or areas where NPS interpretation does not parallel the Act or congressional intent. In the end, WEC members determined the Rule was sufficiently flawed in a number of critical areas and that it should

be withdrawn and a new rule issued for public comment.

As the October comments are detailed in nature and no final rule has been issued, Outward Bound stands behind these comments and will in this statement to the Subcommittee offer only a summary of our support for and objections to key elements of the Rule.

In calling for the Rule to be withdrawn, the WEC focused on three principle areas:

- 1) Sins of omission: Critical policy or administrative issues that were simply not addressed in the Rule.
- 2) Insufficient interpretation: Critical areas of the Act and historical NPS concessions practices that require interpretation or guidance to ensure efficient and equitable application in the field.
- 3) Deviation from the Act or congressional intent: Fundamental areas of the Act, particularly those addressing outfitters and guides, where the Rule appears to be in direct conflict with congressional action.

To quote from the summary of the WEC comments:

*"While this proposed rule effectively addresses many areas of concessions contracts vital to outfitting, guiding and wilderness education operations in the parks, the document is fatally flawed in three critical areas.*

*The first are the glaring omissions. Omissions in providing both interpretation of the law and congressional intent. Omissions in clear guidance to the field on the role and interface of concessioners and permittees in meeting the demand for quality visitor services. This rule fails this mission on three key issues:*

- 1) A complete lack of explanation or guidance on how or why implementation of this rule is projected to reduce concession contracts from an existing 630 to "as few as 350," and what, if any, means should be provided to authorize this use under alternative authorities.*
- 2) The rule is silent of the implementation of the CUA and provisions in the law allowing for limitations on their use.*
- 3) No guidance is offered on the provision in the law exempting some non-profits from registration requirements under the CUA.*

*The second is the distortion of the law and congressional intent in the contract award process by installing and elevating fee bidding as the trump card over clearly mandated elements of performance, resource protection and financial capability. A perversion of the law that subverts even the NPS' own "greening" requirements.*

*The third is the fact that the rule violates the intent of Congress and the Act in trying, where possible to limit or eliminate the right of preference for outfitters, guides and other small businesses.*

*These flaws are simply too significant to be overlooked. The proposed rule should be withdrawn and a new rule issued for public comment."*

## **Support for Selection Factors**

The WEC supports the delineation and weighting of the five factors as proposed in Sec. 51.20 of the Rule.

The WEC supports the "greening" concept of "protecting, conserving, and preserving resources of park areas..." introduced in the Rule. This intent should be carried through in the language presented in Sec. 51.18 through specific reference to resource protection - above and separate from "benefit to the government."

Congressional intent was clear that fees would be subordinate to other factors such as performance and resource protection. This section should read: "...the highest level of performance, *protection or enhancement of park resources*, and benefit to the government...." This language supports the NPS greening concept and reaffirms language in the Act and the congressional record that fees be subordinate to the objectives of protecting, conserving and preserving resources of the park....

As stated, the WEC supports this principal of "greening" NPS policies and procedures. However, in the wording of the Rule, the NPS has overlooked both the contribution and capabilities of wilderness educators, outfitters and guides in contributing to the protection of park resources. Language should be included which speaks not only to conservation and protection, but enhancement of the resource and visitor experiences. Language should address not only the physical resource but visitor-related partnerships related to such areas as diversity; universal access/special populations; education and interpretation (Leave No Trace); volunteer service projects; and education on environmental, cultural, historical and other resources.

## Omissions in the Rule

### A. Commercial Use Authorization

The Rule fails to address Section 418, the Commercial Use Authorization (CUA). While the primary target of the Act was the concessions contract, the proposed CUA will account for up to 90 percent of authorized use in the parks. Today, the predominant authorization is the Incidental Business Permit (IBP), formerly the Commercial Use License (CUL). The CUA is intended as an improvement upon and replacement for the IBP. However, significant issues remain for both interpretation and implementation:

- Neither the CUL nor IBP exist in law. Congress and the agency have the opportunity to clarify the intent and role of this authorization.
- Congress granted the authority to limit the number of CUAs "consistent with the preservation and proper management of park resources." This authority could have a profound impact on the amount and types of use authorized under the CUA. [See Attachment B.]
- The term "incidental use" must be clarified.
- Significant questions remain around the types of operations that will be deemed "incidental" and eligible for the CUA and who will be required, or allowed, to secure a full concessions contract.

### F. The Non-Profit Exemption

The Rule fails to address Sec. 418.(c)(3) the exemption of non-profit organizations from authorization under the CUA.

WEC members are on record as not supporting this language as part of S. 1693 and were not involved in or aware of its inclusion in the Act. WEC members are all non-profit institutions, with long histories of accountability in our use of public lands. The issue here is one of accountable use by all parties, regardless of tax status. The objectives here - for manager and permittee - should be to establish strong working partnerships designed to promote quality visitor services while simultaneously protecting and preserving park resources. This language provides a limited user class with exemption from administrative, financial and physical accountability.

## G. Simplified Procedures

The Act and the intent of Congress were clear in calling for "...simplified procedures for small, individually-owned, concessions contracts...." This Rule fails to address this requirement for streamlined administrative procedures for smaller operators. Additionally, the Rule would appear to contradict the Act in this area through the additional administrative procedures involved in:

- Compliance with "greening" requirement
- Additional layers in the selection process
- Encouragement of fee bidding.

## Insufficient Interpretation

### A. Summary: Regulatory Flexibility Act

*"As of the promulgation of this rule, there are only approximately 630 National Park Service concession contracts and permits. It is likely that upon implementation of this rule and related authorities, this number will decrease, perhaps to as few as 350, as alternative authorities for providing visitor services in areas of the National Park Service System are now available."*

The NPS has chosen the summary of a proposed rule to alert Congress and the concessions industry that the implementation of this Act may result in a 55 percent decrease in the number of concessions contracts issued by the agency. This is particularly problematic in light of earlier concerns expressed around the Rule's silence on the matter of the CUA.

### B. "Necessary and Appropriate"

*"It is also the policy of the Congress and the Secretary of the Interior that development of visitor services in park areas must be limited to those as are necessary and appropriate for public use and enjoyment of the park areas in which they are located."*

The need to clarify the term "necessary and appropriate" is another area where the Rule lacks interpretation or guidance to the field. Along with the issues of the CUA vs. the full concessions contract and the projected 55 percent decrease in contracts awarded, this term represents another area where broad discretion is allowed in approving or limiting visitor services in the parks.

The obvious questions here are what operations are "necessary" to the operation of a given unit, and which operations - particularly those commercial in nature - may be deemed "inappropriate."

## Deviations from the Act

### A. Selection of Concessioners

The Act clearly establishes the primary criteria in a competitive selection process:

- 1) The responsiveness of the proposal to the objectives of protecting, conserving and preserving resources;
- 2) The experience and related background of the operator;
- 3) The financial capability of the operator;
- 4) The proposed franchise fee, except that consideration of revenue to the United States shall be subordinate to the objectives of protecting, conserving and preserving resources of the unit of the National Park System and of providing necessary and appropriate facilities to the public at reasonable rates.

In the selection and award processes proposed in the Rule, the NPS continually subverts not only the clear direction of the Act and the intent of Congress, but their own "greening" process as well. In place of this well structured and prioritized selection process, the NPS has inserted fee bidding as the decisive factor in the selection process.

Sec. 51.21 of the rule assigns an environmental element to the franchise fee process, asserting that these elevated fees will be applied to "substantially greater benefits for the preservation of the resources of the park area." This elevation is totally arbitrary, unsubstantiated in the rulemaking process, and has no support from the congressional record. The end result is that the franchise fee process becomes an open bidding competition that rises to rival and compete against experience, performance and the NPS' own "greening" concept of protecting, conserving and preserving park resources. Fees become a trump card that those in the competition ignore at their own peril and managers can play at will. This is particularly problematic for non-profit education organizations that are driven by mission, rather than by profit.

### E. Satisfactory Performance

The final sentence of Sec. 51.42 should be removed.

Language in the Rule states that a concessioner failing to achieve "satisfactory" status in more than one year of a contract will not be considered a "satisfactory concession" for purposes of renewal. This is fair and appropriate to the goals of quality visitor services and performance-based renewal.

However, the NPS goes on to include a totally arbitrary provision that precludes an overall satisfactory rating should the concession receive a less than satisfactory rating in either of the last two years of the contract. The goal here should be to encourage patterns of compliance and superior performance. This language undermines those objectives and hands managers an arbitrary but powerful means of removing incumbent concessioners.

It is possible the agency intended this language be aimed at larger, hospitality-oriented concessioners, ignoring the circumstances of the outfitting community. For WEC members, concessions contracts/permits are typically no more than five to at most 10 years in length. The "sudden death" provision of the Sec. 51.42 could be in force for over 40 percent of an educator's or outfitter's contract term.

## F. New or Additional Services

Sec. 51.84 again deals with the preferential right of renewal with regards to new or additional services offered by an existing concessioner. This section completely ties the hands of park managers and concessioners without providing any meaningful guidance or definitions to establish the concept of "new or additional visitor services."

## Conclusion

"The National Park Service shall utilize and encourage concessions to play an essential role to protect park resources and provide for their enjoyment." This language from the Act clearly portrays the intent of Congress in the passage of the Concessions Management Improvement Act. Outward Bound, as an educator and an outfitter, supports this philosophy and welcomes this opportunity to work with the Congress and the Park Service on updating, improving and streamlining concessions management policy and practice.

The attached document will provide additional issues and detail for your consideration.

Thank you.

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